Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-5-01 OF 2015, 02(f)-6–01 OF 2015 AND 02(f)-4–01 OF 2015(N)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, SURIYADI AND AZAHAR MOHAMED FCJJ
10 FEBRUARY 2016

Civil Procedure — Jurisdiction — Conflict of jurisdiction between High Court and Syariah Court — Petition for dissolution of marriage and custody of children — One party to non-Muslim marriage converted to Islam — Whether civil courts or Syariah Court had jurisdiction to grant custody order — Whether art 121(1A) of the Federal Constitution operated to deny jurisdiction of civil courts in present case — Whether LRA continued to bind appellant despite his conversion to Islam

Family Law — Children — Custody — Whether custody order of High Court as affirmed by Court of Appeal should be preserved — Welfare of child — Whether child could be presumed to be capable of giving independent opinion on issue of custody — Variation of custody order — Whether variation was necessary in view of change of circumstances — Recovery order — Whether High Court judge should have entertained respondent's application for recovery of son from appellant — Whether appeal against recovery order should be allowed

On 19 March 2003, Viran a/l Nagapan ('the appellant') and Deepa a/p Subramaniam (the respondent) contracted a civil marriage under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). Out of the said marriage, they had two children, a girl named Shamila a/p Viran ('the daughter') and a boy named Mithran a/l Viran ('the son'). On 26 November 2012, the appellant converted to Islam. Later he registered the conversion to Islam of his two children and had their names changed. The appellant also applied for the dissolution of his civil marriage with the respondent at the Seremban Syariah High Court. On 15 May 2013, the Syariah High Court granted an order for the dissolution of the civil marriage. At first the appellant was granted a temporary custody order of his two children but subsequently, the Syariah High Court granted him a permanent custody order of the two children but allowed the respondent to have visitation rights and access to the two children. In the meantime, the respondent wife had filed a petition for divorce at the Seremban Civil High Court and an order for the custody of the two children. On 7 April 2014, the Civil High Court dissolved the civil marriage between the appellant and respondent and granted permanent custody of the two children to the respondent/wife. The appellant was granted

weekly access to the children. On 9 April 2014, the appellant had taken the son away from the respondent's house. The respondent thus applied for a recovery order before the Civil High Court pursuant to s 53 of the Child Act 2001 ('the Child Act'). The High Court judge granted the respondent's application and made, inter alia, orders against the police to enter the appellant's residence in order to recover the son and to return the son to the custody and control of the respondent immediately ('the recovery order'). On 11 April 2014, the appellant filed a notice of appeal against the decision of the High Court judge in granting the custody of the two children to the respondent ('the custody order'). Aggrieved with the recovery order, the appellant also filed an appeal to the Court of Appeal. The appellant's appeals against the custody order as well as the recovery order were heard jointly by the Court of Appeal. The IGP and the AG applied to intervene in the appeal against the recovery order on the grounds that the decision of the Civil High Court on the recovery order had raised issues which concerned the public interest such as whether a recovery order could be made when there existed a custody order given by the Syariah Court in favour of the appellant. The Court of Appeal allowed the application to intervene by the IGP and the AG. After hearing the submissions of the parties, the Court of Appeal dismissed both appeals and affirmed the decision of the Civil High Court in respect of the custody order as well as the recovery order. The appellant then applied for and obtained leave to proceed with the present appeals, which raised the issue of conflict of jurisdiction between the civil courts and the Syariah Courts. The appellant argued that due to his conversion to Islam the civil court had no jurisdiction to dissolve the civil marriage between the appellant and respondent or grant permanent custody of the two children to the respondent. Instead the appellant contended that the matter was within the jurisdiction of the Syariah Court. In support, the appellant referred to art 121(1) and (1A) of the Federal Constitution. The respondent on the other hand submitted that the civil court still retained the jurisdiction on the custody of the children of the civil marriage between the parties despite the appellant's conversion to Islam. The respondent thus contended that the Syariah High Court had no jurisdiction to make the custody order.

Held, dismissing the appeal on the custody order and allowing the appeal on the recovery order with no order as to costs:

(1) The issue as to whether the civil courts or the Syariah Court had jurisdiction to grant a custody order in a situation where one party to a non-Muslim marriage converted to Islam was not new. The civil courts had consistently held that the converted spouse could not use his conversion to Islam to escape responsibilities under the LRA. A non-Muslim marriage did not automatically dissolve upon one of the parties converting to Islam. The civil courts continued to have jurisdiction in respect of divorce as well as custody of the children despite

A the conversion of one party to Islam. In the present case, the appellant and the respondent were Hindus at the time of their marriage and by contracting the civil marriage under the LRA they were bound by its provisions in respect of divorce as well as custody of the children of the marriage. Matters under the LRA were within the jurisdiction of the civil B courts and the civil courts continued to have jurisdiction over them, notwithstanding the appellant's conversion to Islam. Thus, the matter of dispute between the appellant and the respondent in this case was not a matter within the jurisdiction of the Syariah High Court. Thus, on the facts of this case, the Syariah High Court had no jurisdiction to dissolve C the civil marriage between the appellant and the respondent and to make an order granting custody of the two children out of the marriage to the appellant. The jurisdiction to do that was with the civil court (see paras 17–23 & 31–32).

D (2) Further, it followed that art 121(1A) which removed the jurisdiction of the civil courts in respect of any matter within the jurisdiction of the Syariah Courts did not operate to deny the civil courts jurisdiction in respect of the matters set out in s 51 of the LRA. It was clear that art 121(1A) was introduced not for the purpose of ousting the E jurisdiction of the civil courts but to avoid any conflict between the decision of the Syariah Courts and the civil courts, which had occurred in a number of cases before. In the present case, the conflict arose because the appellant had brought his case to the Syariah High Court. However, the LRA continued to bind the appellant despite his conversion to Islam F and the Syariah Courts had no jurisdiction over the appellant's application to dissolve his civil marriage with the respondent or over custody of the children born from the civil marriage under the LRA. The Syariah Courts had jurisdiction only over matters relating to divorce and custody when it involved a Muslim marriage, solemnised according to G Muslim Law. When one of the parties was a non-Muslim, the Syariah Courts did not have the jurisdiction over the case even if the subject matter fell within their jurisdiction. Thus, art 121(1A) of the Federal Constitution which deprived the civil courts jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts was not applicable in H this case and it was important for the civil courts and Syariah Courts not to transgress into each other's jurisdiction (see paras 23–26, 29 & 32).

(3) In considering whether the custody order of the High Court as affirmed by the Court of Appeal should be preserved it became necessary to consider the child's welfare, which was the paramount consideration in I determining the custody of a child. The presumption that a young child was better off with his or her mother rather than his or her father was a rebuttable presumption and that presumption on its own was not necessarily a decisive factor. It had to be weighted together with other factors relevant and the first and paramount consideration ought to be

the welfare of the child. In order to accord the welfare of a child as of paramount importance it was necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his/her wishes as far as they could be ascertained depending on the age of the child, the confidential reports of a social welfare officer and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than the other (see paras 33–35 & 37).

(4) From the cases that had been decided, it would be reasonable to suggest that children above the age of seven could be presumed to be capable of giving independent opinion. In the present case, a change in the circumstances had occurred when the son was taken away from the respondent's house by the appellant two days after the custody order. When the son and daughter were interviewed privately, it was found that the son preferred to stay with his father and did not wish to live with his mother, while the daughter expressed her wish to live with her mother. It was clear that both children were certain of their choices, had settled down and were well cared for. As such, taking into consideration the welfare of the children it became apparent that it was undesirable to disturb the present arrangement. In the circumstances, the custody order granted by the High Court ought to be varied such that the custody of the daughter remained with the respondent while the custody of the son moved to the appellant (see paras 41 & 46–49).

(5) As for the recovery order, it was an undisputed fact there were two custodial orders, namely the Syariah High Court's order dated 19 September 2013, which granted custody of the children to the appellant and the Civil High Court's order dated 7 April 2014, which gave custody of the children to the respondent. In the light of the existence of the two conflicting custodial orders, the High Court judge should not have entertained the application of the respondent for the recovery of the son from the appellant. Although the Syariah Court had no jurisdiction in this case to make the custody order, the Syariah Court order remained a valid order until it was set aside. Thus, the High Court judge, could not direct the IGP or his officers to execute the High Court judgment, irrespective of the Syariah High Court order. On the facts of this case, both the Syariah High Court order and Civil High Court order would bind the IGP and his officers either way and clearly the execution and performance of one order was impossible without being in contempt of the other. As such, on the facts and circumstances of this case, the recovery order should not have been given because the pertinent element under s 52 of the Child Act had not been fulfilled. Consequently, the appeal on the recovery order should be allowed (see paras 54–58).

[Bahasa Malaysia summary

Pada 19 Mac 2003, Viran a/l Nagapan ('perayu') dan Deepa a/p Subramaniam ('responden') telah memasuki perkahwinan sivil di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('APU'). Hasil perkahwinan tersebut, mereka mendapat dua anak, seorang perempuan bernama Shamila a/p Viran ('anak perempuan') dan seorang lelaki bernama Mithran a/l Viran ('anak lelaki'). Pada 26 November 2012, perayu telah memeluk Islam. Kemudian dia telah mendaftarkan pemelukan Islam kedua-dua anaknya dan telah menukar nama mereka. Perayu juga telah memohon pembubaran perkahwinan sivilnya dengan responden di Mahkamah Tinggi Syariah Seremban. Pada 15 Mei 2013, Mahkamah Tinggi Syariah telah memberikan perintah untuk pembubaran perkahwinan sivil itu. Pada mulanya perayu telah memberikan perintah jagaan sementara ke atas dua orang anaknya tetapi berikutan itu, Mahkamah Tinggi Syariah telah memberikannya perintah hak penjagaan tetap ke atas dua orang anak itu tetapi membenarkan responden mempunyai hak melawat dan akses kepada dua anak tersebut. Sementara itu, responden isteri telah memfailkan petisyen untuk perceraian di Mahkamah Tinggi Sivil Seremban dan perintah hak penjagaan dua orang anak itu. Pada 7 April 2014, Mahkamah Tinggi Sivil telah membubarkan perkahwinan sivil antara perayu dan responden dan memberikan hak penjagaan tetap dua anak itu kepada responden/isteri. Perayu telah diberikan akses mingguan kepada anak-anak itu. Pada 9 April 2014, perayu telah mengambil anak lelaki itu daripada rumah responden. Responden oleh itu telah memohon untuk perintah pengembalian di hadapan Mahkamah Tinggi Sivil menurut s 53 Akta Kanak-Kanak 2001 ('Akta Kanak-Kanak'). Hakim Mahkamah Tinggi telah memberikan permohonan responden dan membuat, antara lain, perintah-perintah terhadap polis untuk memasuki kediaman perayu bagi tujuan mendapat balik anak lelaki itu dan mengembalikan anak lelaki itu kepada penjagaan dan kawalan responden dengan segera ('perintah pengembalian'). Pada 11 April 2014, perayu telah memfailkan notis rayuan terhadap keputusan hakim Mahkamah Tinggi kerana memberikan hak penjagaan kedua-dua kanak-kanak itu kepada responden ('perintah hak penjagaan'). Terkilan dengan perintah pengembalian itu, perayu juga telah memfailkan rayuan kepada Mahkamah Rayuan. Rayuan-rayuan perayu terhadap perintah hak penjagaan dan juga perintah pengembalian telah didengar bersama oleh Mahkamah Rayuan. IGP dan AG telah memohon untuk campur tangan dalam rayuan terhadap perintah pengembalian itu atas alasan bahawa keputusan Mahkamah Tinggi Sivil berhubung perintah pengembalian itu telah menimbulkan isu-isu yang melibatkan kepentingan awam seperti sama ada suatu perintah pengembalian boleh dibuat apabila terdapat perintah hak penjagaan yang diberikan oleh Mahkamah Syariah yang menyebelahi perayu. Mahkamah Rayuan telah membenarkan permohonan untuk campur tangan oleh IGP dan AG. Selepas mendengar hujah-hujah pihak-pihak, Mahkamah Rayuan telah menolak kedua-dua rayuan dan

mengesahkan keputusan Mahkamah Tinggi Sivil berkaitan perintah hak penjagaan dan juga perintah pengembalian. Perayu kemudian telah memohon untuk dan memperoleh kebenaran meneruskan rayuan-rayuan itu, yang menimbulkan isu konflik bidang kuasa antara Mahkamah Sivil dan Mahkamah Syariah. Perayu berhujah bahawa akibat dia memeluk Islam Mahkamah Sivil tidak mempunyai bidang kuasa untuk membubarkan perkahwinan sivil antara perayu dan responden atau memberikan hak penjagaan tetap ke atas kedua-dua kanak-kanak itu kepada responden. Sebaliknya perayu berhujah bahawa perkara itu adalah dalam bidang kuasa Mahkamah Syariah. Sebagai sokongan, perayu merujuk kepada perkara 121(1) dan (1A) Perlembagaan Persekutuan. Responden sebaliknya berhujah bahawa Mahkamah Sivil masih mempunyai bidang kuasa ke atas penjagaan kanak-kanak dalam perkahwinan sivil antara pihak-pihak itu meskipun perayu telah memeluk Islam. Responden dengan itu menegaskan bahawa Mahkamah Tinggi Syariah tidak mempunyai bidang kuasa untuk membuat perintah hak penjagaan.

Diputuskan, menolak rayuan berhubung perintah hak penjagaan dan membenarkan rayuan berhubung perintah pengembalian tanpa perintah untuk kos:

(1) Isu sama ada mahkamah sivil atau Mahkamah Syariah mempunyai bidang kuasa untuk memberikan perintah hak penjagaan dalam keadaan di mana salah satu pihak kepada perkahwinan bukan secara Islam itu memeluk Islam bukan suatu yang baru. Mahkamah Sivil secara konsisten telah memutuskan bahawa pasangan yang bertukar agama tidak boleh menggunakan pemelukan Islamnya untuk lari daripada tanggungjawab di bawah APU. Perkahwinan bukan secara Islam tidak secara automatik membubarkan salah satu pihak yang memeluk Islam. Mahkamah Sivil masih mempunyai bidang kuasa berkaitan perceraian dan juga hak penjagaan kanak-kanak itu meskipun penukaran agama satu pihak kepada Islam. Dalam kes ini, perayu dan responden adalah penganut Hindu pada masa perkahwinan mereka dan dengan memasuki perkahsinan sivil di bawah APU itu mereka terikat dengan peruntukan-peruntukannya berkaitan perceraian dan juga hak penjagaan kana-kanak dalam perkahwinan itu. Perkara-perkara di bawah APU adalah dalam bidang kuasa mahkamah sivil dan mahkamah sivil berterusan mempunyai bidang kuasa ke atas mereka, meskipun perayu telah memeluk Islam. Oleh itu, perkara berhubung pertikaian antara perayu dan responden dalam kes ini bukan suatu perkara dalam bidang kuasa Mahkamah Tinggi Syariah. Dengan itu, berdasarkan fakta kes ini, Mahkamah Tinggi Syariah tidak mempunyai bidang kuasa untuk membubarkan perkahwinan sivil antara perayu dan responden dan untuk membuat perintah memberikan hak penjagaan kedua-dua kanak-kanak hasil perkahwinan itu kepada perayu. Bidang kuasa untuk

berbuat demikian terletak pada mahkamah sivil (lihat perenggan 17–23 & 31–32).

(2) Selanjutnya, ia diikuti bahawa perkara 121(1A) yang melupuskan bidang kuasa mahkamah sivil berkaitan apa-apa perkara dalam bidang kuasa Mahkamah Syariah tidak beroperasi untuk menafikan mahkamah sivil bidang kuasa berkaitan perkara-perkara yang dinyatakan dalam s 51 APU. Ia jelas bahawa perkara 121(1A) telah diperkenalkan bukan bagi tujuan mengenepikan bidang kuasa mahkamah sivil tetapi untuk mengelakkan apa-apa konflik antara keputusan Mahkamah Syariah dan mahkamah sivil, yang telah berlaku dalam beberapa kes sebelum ini. Dalam kes ini, konflik timbul kerana perayu telah mengemukakan kesnya kepada Mahkamah Tinggi Syariah. Walau bagaimanapun, APU terus mengikat perayu meskipun dia telah memeluk Islam dan Mahkamah Syariah tidak mempunyai bidang kuasa ke atas permohonan perayu untuk membatalkan perkahwinan sivilnya dengan responden atau berhubung hak penjagaan kanak-kanak yang lahir hasil perkahwinan sivil di bawah APU. Mahkamah Syariah mempunyai bidang kuasa hanya ke atas perkara-perkara berkaitan perceraian dan hak penjagaan apabila ia melibatkan perkahwinan secara Islam, yang dilaksanakan menurut undang-undang Islam. Apabila salah seorang daripada pihak-pihak itu bukan seorang Muslim, Mahkamah Syariah tidak mempunyai bidang kuasa ke atas kes itu meskipun hal perkara itu terjatuh dalam bidang kuasa mereka. Oleh itu, perkara 121(1A) Perlembagaan Persekutuan yang tidak membenarkan bidang kuasa mahkamah sivil berkaitan apa-apa perkara dalam bidang kuasa Mahkamah Syariah tidak terpakai dalam kes ini dan ia penting untuk mahkamah sivil dan Mahkamah Syariah untuk tidak melangkaui dalam bidang kuasa masing-masing (lihat perenggan 23–26, 29 & 32).

(3) Dalam mengambil kira sama ada perintah hak penjagaan Mahkamah Tinggi sepertimana disahkan oleh Mahkamah Rayuan patut kekalkan ia menjadi perlu untuk mengambil kira kebajikan kanak-kanak itu, yang merupakan pertimbangan paling utama dalam menentukan hak penjagaan kanak-kanak itu. Andaian bahawa seorang kanak-kanak muda lebih elok bersama ibunya dan bukan bapanya merupakan andaian yang coleh dipatahkan dan bahawa andaian itu sendiri tidak semestinya suatu faktor penentu. Ia perlu diimbangi bersama faktor-faktor lain yang relevan dan pertimbangan yang pertama dan penting sepatutnya kebajikan kanak-kanak. Bagi tujuan menjadikan kebajikan anak-anak suatu yang paling utama ia adalah perlu untuk mengambil kira perkara-perkara seperti kelakuan pihak-pihak, status kewangan dan sosial mereka, jantina dan umur kanak-kanak itu, hasratnya setakat mana ia boleh ditentukan bergantung kepada umut kanak-kanak, laporan sulit pegawai kebajikan social dan sama ada dalam jangka panjang ia lebih kepada kepentingan, kebajikan dan kegembiraan kanak-kanak itu untuk

bersama ibu atau bapa (lihat perenggan 33–35 & 37).

(4) Berdasarkan kes-kes yang telah diputuskan, ia adalah munasabah untuk mencadangkan bahawa kanak-kanak atas tujuh tahun boleh dianggap mampu memberikan pendapat yang bebas. Dalam kes ini, pertukaran dalam keadaan telah berlaku apabila anak lelakinya telah diambil daripada rumah responden oleh perayu dua hari selepas perintah hak penjagaan. Apabila anak lelaki dan anak perempuan disoal secara rahsia, ia didapati bahawa anak lelaki itu memilih untuk tinggal dengan bapanya dan tidak berhasrat untuk tinggal dengan ibunya, manakala anak perempuan itu telah menyatakan dia ingin tinggal dengan ibunya. Ia jelas bahawa kedua-dua kanak-kanak itu pasti dengan pilihan mereka, telah selesa dan dijaga dengan baik. Oleh itu, dengan mengambil kira kebajikan kanak-kanak tersebut ia menjadi jelas bahawa ia tidak perlu untuk mengganggu urusan sekarang. Dalam keadaan itu, perintah hak penjagaan yang diberikan oleh Mahkamah Tinggi patut diubah agar hak penjagaan anak perempuan kekal dengan responden manakala hak penjagaan anak lelaki berpindah kepada perayu (lihat perenggan 41 & 46–49).

(5) Berhubung perintah pengembalian, ia fakta yang tidak dipertikaikan yang terdapat dua perintah hak penjagaan, iaitu perintah Mahkamah Syariah bertarikh 19 September 2013, yang memberi hak penjagaan kanak-kanak tersebut kepada perayu dan perintah Mahkamah Tinggi Sivil bertarikh 7 April 2014, yang memberi hak penjagaan kanak-kanak tersebut kepada responden. Berdasarkan kewujudan dua perintah hak penjagaan yang bercanggah, hakim Mahkamah Tinggi tidak patut melayan permohonan responden untuk mendapat balik anak lelaki itu daripada perayu. Walaupun Mahkamah Syariah tiada bidang kuasa dalam kes ini untuk membuat perintah hak penjagaan, perintah Mahkamah Syariah masih perintah yang sah sehingga ia diketepikan. Oleh itu, hakim Mahkamah Tinggi, tidak boleh mengarah IGP dan pegawai-pegawainya untuk melaksanakan penghakiman Mahkamah Tinggi, tanpa mengira perintah Mahkamah Tinggi Syariah. Berdasarkan fakta kes ini, kedua-dua perintah Mahkamah Tinggi Syariah dan perintah Mahkamah Tinggi Sivil akan mengikat IGP dan pegawai-pegawainya dan jelas pelaksanaan dan prestasi salah satu perintah itu mustahil tidak menghina yang satu lagi. Oleh itu, berdasarkan fakta dan keadaan kes ini, perintah pengembalian tidak patut diberikan kerana elemen penting di bawah s 52 Akta Kanak-Kanak tidak dipenuhi. Berikutan itu, rayuan berhubung perintah pengembalian itu patut dibenarkan (lihat perenggan 54–58).]

Notes

For cases on conflict of jurisdiction between High Court and Syariah Court, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5648–5652.

A For cases on custody, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 3815–3871.

Cases referred to

B Ravandran s/o Balan v Maliga d/o Mani Pillai [1996] 2 MLJ 150, HC (refd)
J and Another v C and Others [1970] AC 668, HL (refd)
B *Kung Lim Siew Wan (P) lwn Choong Chee Kuan* [2003] 6 MLJ 260, HC (refd)
Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101, FC (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, FC (refd)
Manickam v Intherahnee [1985] 1 MLJ 56, FC (refd)
C *KO (An Infant), Re* [1990] 1 MLJ 494, HC (refd)
Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah [2004] 2 MLJ 241, HC (refd)
Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147, FC (folld)
D *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117, SC (folld)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234, FC (refd)
Tey Siew Choo v Teo Eng Hua [1999] 6 CLJ 308, HC (refd)

E **Legislation referred to**

Federal Constitution art 121(1), 121(1A), Federal List, State List
Islamic Family Law (Federal Territory) Act 1984 s 46(2)
Islamic Family Law (Negeri Sembilan) Enactment 2003 ss 4, 45, 46(2)
Law Reform (Marriage and Divorce) Act 1976 ss 3(3), 51, 88(2), (3)

F

Appeal from: Civil Appeal Nos N-02–801–05 of 2004 and N-02–1004–06 of 2014 (Court of Appeal, Putrajaya)

Suzana Atan (Arik Sanusi Yeop Johari and Shamsul Bolhassan with her) (Senior
G *Federal Counsels, Attorney General's Chambers) in Civil Appeal No 02–4–01 of 2015(N) for the appellant.*
Haniff Khatri (Kamarul Arifin Wafa, Faiz Fadzil, Mohd Tajuddin Abd Razak and Muhd Bakhtiar Roslan with him) (Kamarul Arifin Wafa & Assoc) in Civil Appeal Nos 02–5–01 of 2015(N) and 02–6–01 of 2015(N) for the appellant.
H *Fahri Azzat (Aston Paiva and Joanne Leong with him) (Yeoh & Joanne) in Civil Appeal Nos 02–4–01 of 2015(N), 02–5–01 of 2015(N) and 02–6–01 of 2015(N) for the respondent.*
Goh Siu Lin (watching brief for Women's Aid Organisation (WAO), Association of
I *Women Lawyers (AWL), All Women's Action Society, Perak Women for Women Society, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Persatuan Sahabat Wanita Selangor, Sabah Women's Action Resource Group (SAWO), Sisters in Islam (SIS), Tenaganita, Women's Centre for Change (WCC Penang).*
Andrew Khoo Chin Hock (watching brief for Bar Council Malaysia and Suruhanjaya Hak Asasi Manusia (SUHAKAM)).

Abdul Rahim Sinwan (Mohd Fasha Mustafa with him) (watching brief for PPMM).
Mohd Khairul Anuar Ismail (Mohd Raimi Abd Rahim with him) (watching brief for ABIM).

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] There are three interrelated appeals before us, arising from the judgment of the Court of Appeal dated 17 December 2014 which dismissed the appellant's appeals. Leave to appeal was granted by this court on 14 January 2015 on the following questions of law:

(i) Whether in the context of Article 121(1A) of the Federal Constitution, where a Custody Order is made by the Syariah Court or the Civil Court on the basis that it has jurisdiction to do so, whether there is jurisdiction for the other court to make a conflicting order.

(ii) Whether on the interpretation of sections 52 and 53 of the Child Act 2001, a Recovery Order can be made when there exist a custody order given by the Syariah Court which is enforceable at the same time.

BACKGROUND FACTS

[2] The above mentioned questions of law flow from the following background. On 19 March 2003, the appellant ('ex-husband') and the respondent ('ex-wife') contracted a civil marriage under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). Out of the said marriage, they have two children, a girl named Shamila a/p Viran ('Shamila') and a boy named Mithran a/l Viran ('Mithran').

[3] On 26 November 2012, the ex-husband converted to Islam at Pusat Dakwah Islamiah, Paroi, Negeri Sembilan and changed his name to Izwan bin Abdullah. Thereafter, on 4 January 2013, the ex-husband registered the conversion to Islam of his two children, Shamila and Mithran at Pusat Dakwah Islamiah, Paroi, Negeri Sembilan and had their names changed to Nur Nabila bt Izwan and Muhammad Nabil bin Izwan, respectively.

[4] The ex-husband, upon his conversion to Islam, applied for the dissolution of his civil marriage with the ex-wife at the Seremban Syariah High Court. An order for the dissolution of the civil marriage was granted by the Syariah High Court on 15 May 2013 based on s 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003 ('Enactment 2003').

[5] On 26 August 2013, the ex-husband was granted temporary custody order of his two children by the Syariah High Court. Subsequently, on 19 September 2013, the Syariah High Court granted permanent custody order of the two children to the ex-husband but allowed the ex-wife to have visitation rights and access to the two children.

[6] In the meantime, the ex-wife on 12 December 2013, filed a petition for divorce at the Seremban Civil High Court and for the custody of the two children. On 7 April 2014, the Civil High Court dissolved the civil marriage between the ex-husband and ex-wife and granted permanent custody of the two children to the ex-wife. The ex-husband was granted weekly access to the children.

[7] On 11 April 2014, the ex-husband filed a notice of appeal against the decision of the High Court judge in granting the custody of the two children to the ex-wife.

[8] Earlier, on 9 April 2014 another event unfolded. Mithran was taken away from the ex-wife's house by the ex-husband. The ex-wife then applied for recovery order before the Civil High Court pursuant to s 53 of the Child Act 2001 ('the Child Act'). The High Court judge granted the ex-wife's application and made the following orders against the Inspector General of Police ('IGP') and/or his officers:

(a) to enter the ex-husband's residence or Taska ABIM Nur Ehsan or any premise in order to recover the child Mithran;

(b) to take custody of Mithran and to return the child to the custody and control of the ex-wife immediately;

(c) to remove Mithran from the custody of the ex-husband or from anyone having custody and control of Mithran; and

(d) to execute the High Court judgment irrespective of the Syariah Court order which had granted custody to the ex-husband.

[9] Aggrieved with the recovery order, the ex-husband also filed an appeal to the Court of Appeal.

[10] The appeals by the ex-husband against the custody order as well as the recovery order were heard jointly by the Court of Appeal. Before the hearing of the appeals, the attorney general and the IGP applied to intervene in respect of the recovery order appeal. The attorney general and the IGP in justifying their intervention stated that the decision of the Civil High Court on the recovery order had raised issues which concern the public interest, namely:

(a) the interpretation of ss 52 and 53 of the Child Act as to whether a recovery order can be made when there exists a custody order given by the Syariah Court in favour of the ex-husband;

(b) the jurisdiction of the civil court and the Syariah Court in respect of custody orders and whether the civil court prevails over the Syariah Court; and

(c) whether the civil court can exercise supervisory jurisdiction over the Syariah Court.

[11] The application to intervene by the attorney general and IGP was allowed by the Court of Appeal.

[12] On 17 December 2014, the Court of Appeal dismissed both appeals. The Court of Appeal affirmed the decision of the Civil High Court in respect of the custody order as well as the recovery order.

[13] On 14 January 2015, the Federal Court allowed the ex-husband's applications vide Application Nos 08–747–12 of 2014 and 08–748–12 of 2014, which were heard together with the Attorney General's Application No 08–7–01 of 2015, for leave to appeal to this court on the two questions of law as stated earlier.

[14] We will now deal with the two questions of law in turn.

QUESTION 1

Whether in the context of art 121(1A) of the Federal Constitution, where a custody order is made by the Syariah Court or the Civil High Court, on the basis that it has jurisdiction to do so, whether there is jurisdiction for the other court to make a conflicting order

[15] The above question raised the issue of conflict of jurisdiction between the civil courts and the Syariah Courts. Learned counsel for the ex-husband submitted that the Civil High Court has no jurisdiction to grant the custody order of the children to the ex-wife. The reason being that the ex-husband and the children were already Muslims before the filing of the divorce petition and custody order for the children by the ex-wife at the Civil High Court. It was argued that the Syariah High Court had rightly exercised its jurisdiction in dissolving the ex-husband's marriage with the ex-wife and thereafter granting the custody of the children to the ex-husband. Since the matter is within the jurisdiction of the Syariah Court, the civil court has no jurisdiction in respect of the said matter. In support, learned counsel referred to us art 121(1) and (1A) of the Federal Constitution which reads:

(1) There shall be two High Courts of co-ordinate jurisdiction and statues namely —

(a) one in the states of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in states of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the states of Sabah and Sarawak as the Yang di-Pertuan Agong may determine, and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[16] On the other hand, learned counsel for the ex-wife contended that art 121(1A) would only apply when the Syariah Court has acted within its jurisdiction. It was submitted that in the instant case the Syariah High Court has no jurisdiction to make the custody order, as the civil court still retains the jurisdiction on the custody of the children of the civil marriage between the ex-husband and the ex-wife despite the ex-husband's conversion to Islam. In support, learned counsel referred to us ss 3(3) and 51 of the LRA which reads:

3(3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

51(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversions.

(2) The Court upon dissolving the marriage may make provision of the wife or husband, and for the support care and custody of the children of the marriage if any, and may attach any conditions to the decree of the dissolution as it think fit.

[17] The issue is whether the civil court still retains jurisdiction over the custody of the children of the civil marriage under the LRA despite the ex-husband's conversion to Islam. Section 3(3) of the LRA specifically excludes Muslims from its application except where a petition for a divorce is filed by the non-converting spouse against the converted spouse on the ground of conversion to Islam. It is provided for under s 51 of the LRA that the conversion to Islam of one spouse can be a ground for the non-converting

spouse to petition for divorce and seek ancillary reliefs.

[18] In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147, Nik Hashim FCJ in dealing with s 51 of the LRA quoted the statement by Mohamed Dzaiddin SCJ (as he then was) in *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 at p 167:

> The Legislature, by enacting s 51 clearly envisaged a situation that where one party to non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs. Further, it would seem to us that Parliament in enacting sub-s 51(2) of the LRA, must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert.

[19] Nik Hashim FCJ went further and stated at p 168 that:

> The husband could not shield himself behind the freedom of religion clause under art 11(1) of the FC to avoid his antecedent obligations under 1976 Act on the ground that the civil court has no jurisdiction over him. It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore, the status of the husband and wife at the time of registering their marriage was of material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect of divorce and custody of the children of the marriage and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam.

[20] In *Tang Sung Mooi v Too Miew Kim*, the issue was whether the High Court was entitled to exercise its continuing jurisdiction to grant the ancillary relief in view of the conversion of the husband to Islam. The then Supreme Court answered it in the affirmative. Mohamad Dzaiddin SCJ (as he then was) speaking for the Supreme Court at p 124 said:

> From the wording of s 51(2) of the Act, the Legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam. In our opinion ... the High Court ... has jurisdiction to hear and determine the ancillary issues .... It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since Syariah Courts do not have jurisdiction over non-Muslims. In the context of the legislative intent of s 3 and the overall purpose of the Act, the respondent's legal obligation under a non-Muslim marriage cannot surely be extinguished or avoided by his conversion to Islam.

[21] Thus, the issue is not new. The civil courts had consistently held that the converted spouse cannot use his conversion to Islam to escape responsibilities

under the LRA (also see *Tey Siew Choo v Teo Eng Hua* [1999] 6 CLJ 308, *Kung Lim Siew Wan (P) lwn Choong Chee Kuan* [2003] 6 MLJ 260 and *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 241).

[22] We have no reason to depart from the earlier decisions. We are of the same view that a non-Muslim marriage does not automatically dissolve upon one of the parties converting to Islam. The civil courts continue to have jurisdiction in respect of divorce as well as custody of the children despite the conversion of one party to Islam.

[23] In the present case, the ex-husband and the ex-wife were Hindus at the time of their marriage. By contracting the civil marriage under the LRA they are bound by its provisions in respect of divorce as well as custody of the children of the marriage. Matters under the LRA are within the jurisdiction of the civil courts and the civil courts continue to have jurisdiction over them, notwithstanding the ex-husband's conversion to Islam. Thus, the matter of dispute between the ex-husband and the ex-wife in this case is not a matter within the jurisdiction of the Syariah High Court. It follows that art 121(1A) which removes the jurisdiction of the civil courts in respect of any matter within the jurisdiction of the Syariah Courts does not operate to deny the civil courts jurisdiction in respect of the matters set out in s 51 of the LRA.

[24] In *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, this court through Abdul Hamid Mohamad FCJ (as he then was) had clearly explained the legislative history behind the insertion of art 121(1A) of the Federal Constitution where he said:

> [50] Something should be said about cl (1A) of art 121. This clause was added by Act A 704 and came into force from 10 June 1988. As explained by Professor Ahmad Ibrahim, who I would say was the prime mover behind this amendment in his article '*The Amendment of Article 121 of the Federal Constitution: Its effect on the Administration of Islamic Law*' [1989] 2 MLJ xvii:
>
> > One important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases before. For example, in *Myriam v Ariff* ...
>
> [51] Prior to the establishment of the syariah courts, custody of children, Muslim and non-Muslim, was within the jurisdiction of the civil courts. Then the syariah courts were established with jurisdiction regarding custody of Muslim children, pursuant to the provision of the State List. However, in *Myriam v Mohamed Arif*, the High Court held that it still had jurisdiction regarding custody of Muslim children. Hence the amendment.
>
> [52] Actually if laws are made by Parliament and the Legislatures of the States in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, there should not be any situation where both courts have jurisdiction over the same matter or issue. It may be that, as in the instant appeal, the

granting of the letters of administration and the order of distribution is a matter within the jurisdiction of the civil court but the determination of the Islamic law issue arising in the petition is within the jurisdiction of the syariah court. But, these are two distinct issues, one falls within the jurisdiction of the civil court and the other falls within the jurisdiction of the Syariah Court. Still, there is a clear division of the issues that either court will have to decide. So, there is no question of both courts having jurisdiction over the same matter or issue.

[53] Of course, such a situation can arise where the Legislature of a State makes law that infringes on matters within the Federal List. I am quite sure that there are such laws made by the Legislatures of the States after the introduction of cl (1A) of art 121 even though I shall refrain from mentioning them in this judgment. In such a situation the civil court will be asked to apply the provision of cl (1A) of art 121 to exclude the jurisdiction of the civil court. The civil court should not be influenced by such an argument. Clause (1A) of art 121 was not introduced for the purpose of ousting the jurisdiction of the civil courts. The question to be asked is: Are such laws constitutional in the first place? And the constitutionality of such laws are a matter for the Federal Court to decide — art 128.

[25] It is clear that art 121(1A) was introduced not for the purpose of ousting the jurisdiction of the civil courts. It was introduced in order to avoid any conflict between the decision of the Syariah Courts and the civil courts which had occurred in a number of cases before. In the present case, the conflict arose because the ex-husband had brought his case to the Syariah High Court. But as discussed earlier, the LRA continues to bind the ex-husband despite his conversion to Islam. The Syariah Courts have no jurisdiction over the ex-husband's application to dissolve his civil marriage with the ex-wife. Neither have the Syariah Courts jurisdiction over custody of the children born from the civil marriage under the LRA. The Syariah Courts have jurisdiction only over matter relating to divorce and custody when it involves a Muslim marriage, solemnised according to Muslim Law. When one of the parties is a non-Muslim, the Syariah Courts do not have the jurisdiction over the case even if the subject matter falls within their jurisdiction.

[26] Thus, it is important for the civil courts and Syariah Courts not to transgress into each other's jurisdiction. It is also important to note that both the Syariah Courts and the civil courts are creatures of statutes and they owe their existence to the Federal Constitution, the Acts of Parliament and the State Enactments. It should be to these relevant statutes that both courts should look to in determining whether they have jurisdiction or not. As rightly pointed by Abdul Hamid Mohamad FCJ (as he then was) in *Latifah bte Mat Zin* that if laws made by Parliament and the Legislature of the State are in strict compliance with the Federal List and State List, then there should not be any situation where both courts have jurisdiction over the same subject matter.

[27] In the present case, the Syariah High Court had granted the dissolution of the civil marriage between the ex-husband and the ex-wife pursuant to s 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003 ('the Enactment 2003') which reads:

> (2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

[28] With respect to the learned Syariah High Court judge, if he had not confined himself only to s 46(2) of the Enactment 2003, but instead referred to ss 4 and 45 of the Enactment 2003 he would have realised that the Syariah Court has no jurisdiction to entertain the ex-husband's application to dissolve the marriage. Sections 4 and 45 provide as follows:

> 4 Application
>
> Save as otherwise expressly provided, this Enactment shall apply to all Muslim living in the State of Negeri Sembilan and to all Muslims resident in the State of Negeri Sembilan who are living outside the state.
>
> 45 Extent of power to make any order
>
> Save as is otherwise expressly provided, nothing in this Enactment shall authorize the Court to make an order of divorce or an order shall authorize the Court make an order of divorce or an order pertaining to a divorce (SIC) or to permit a husband to pronounce a talaq except:
>
> (a) where the marriage has been registered or is deemed to be registered under this Enactment;
>
> (b) where the marriage was solemnized in accordance with Hukum Syarak; or
>
> (c) where the residence of either of the parties to the marriage at the time when the application is presented is in the State of Negeri Sembilan.

[29] It is clear that s 4 specifically provides that Enactment 2003 is applicable only to Muslims. Furthermore s 45 provides that the Syariah Court can only grant orders pertaining to divorce or allows the pronouncement of *talaq* by the husband where the marriage is registered or deemed to be registered under Enactment 2003 or that the marriage was solemnised in accordance to the Syariah Law. In the present case, the marriage between the ex-husband and the ex-wife was not registered under Enactment 2003. Neither was the marriage solemnised in accordance with the Syariah Law. The marriage was a civil marriage in accordance with the LRA. Thus, it is the LRA that determines the jurisdiction pertaining to the dissolution of marriage between the ex-husband and the ex-wife and any ancillary reliefs thereto.

[30] Section 46(2) of the Enactment 2003 is in pari materia with s 46(2) of the Islamic Family Law (Federal Territory) Act 1984 which was dealt with by Abdul Aziz Mohamad FCJ in *Subashini a/p Rajasingam* where he held that

s 46(2) of the Islamic Family Law (Federal Territory) Act 1984 does not enable a Syariah Court to bring about a dissolution of a non-Muslim marriage where a party to it has converted to Islam. In the words of the learned judge:

> ... It is obvious from the very wording of the section that it is predicated on the supposition that in Islamic law the conversion of a party to Islam by itself may or does not operate to dissolve the marriage. The section prevents the supposition from having a legal effect unless and until it is confirmed by the Syariah Court. What the Syariah Court does under the section is merely to confirm that the conversion has operated to dissolve the marriage. It is confirmation of the consequence on the marriage, according to Islamic law, of the act of one of the parties. The Syariah Court does not do anything under s 46(2) to bring about the dissolution of the marriage. It merely confirms that a dissolution has taken place by reason of conversion. I agree with the wife that s 46(2) does not confer jurisdiction on the Syariah Courts to dissolve a non-Muslim marriage. In relation to that section, therefore cl(1A) of art 121 does not apply to deprive the High Court of jurisdiction under s 51 of the Law Reform Act.

[31] We adopt the same view. Thus, on the facts of this case, the Syariah High Court has no jurisdiction to dissolve the civil marriage between the ex-husband and the ex-wife and to make an order granting custody of the two children out of the marriage to the ex-husband. The jurisdiction to do that is with the civil court. In consequence, the Syariah Court's order in dissolving the marriage between the ex-husband and the ex-wife and granting custody of the children to the ex-husband is of no effect due to want of jurisdiction.

[32] Based on the above, Question 1 as posed to us in this appeal may now be answered this way. The civil courts have the exclusive jurisdiction to grant decrees of divorce of a civil marriage under the LRA and to make all other ancillary orders including custody care and access of the children born out of that marriage and all other matters ancillary thereto. It is an abuse of process for the spouse who has converted to Islam to file for dissolution of the marriage and for custody of the children in the Syariah Courts. This is because the dispute between parties is not a matter within the exclusive jurisdiction of the Syariah Courts. Therefore, art 121(1A) of the Federal Constitution which deprives the civil courts jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts is not applicable in this case.

[33] The next crucial issue is whether the High Court order, which was affirmed by the Court of Appeal, granting custody of the children to the ex-wife was a proper exercise of discretion. It is settled law that the paramount consideration in determining the custody of a child is the child's welfare. The wordings of s 88(3) of the LRA pronounce this consideration in clear terms. Section 88(3) of the LRA reads:

> There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that

presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[34] However, the presumption that a young child is better off with his or her mother rather than his or her father is a rebuttable presumption. That presumption is not on its own necessarily a decisive factor. It must be weighted together with other factors relevant and the first and paramount consideration must be the welfare of the child.

[35] The phrase 'first and paramount consideration' is not elaborated upon by the LRA. But we can seek guidance from some of the decided cases to appreciate the scope of that phrase. In one classical English case of *J and Another v C and Others* [1970] AC 668, Lord MacDermott in dealing with that phrase said:

> I think it connotes a process whereby, when all relevant facts, relationship claims and wishes of the parents, risks, choices and other circumstances are take into account and weighed, the course to be followed will be that which is most in the interest of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

[36] Lord MacDermott's approach above was cited with approval by the Federal Court in *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189. Earlier, the Federal Court in the case of *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234, had expressed the view that the maintenance of a stable and secure home in which the children can enjoy love and affection seemed to be the most important element that should be taken into consideration.

[37] However, this does not mean that the court should not take other relevant factors into consideration. Indeed, in order to accord the welfare of a child as of paramount importance it is necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his/her wishes as far as they can be ascertained depending on the age of the child, the confidential reports of a social welfare officer and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than the other. This position is fortified through s 88(2) of the LRA which clearly provides:

> In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —
>
> (a) to the wishes of the parents of the child, and
>
> (b) the wishes of the child, where he or she is of an age to express an independent opinion.

[38] In evaluating the independent opinion express by the child, the court would normally follow the opinions given if those opinions are consistent with the interests of the child. In the case of *Re KO (An Infant)* [1990] 1 MLJ 494 Edgar Joseph Jr had this to say:

> ... I reminded myself that how influential an infant's wishes are will clearly depend upon the extent to which they coincide with his best interests in the opinion of the court.

[39] Whilst considering the wishes of the child, the court must always take into consideration on the possibility that the child might have been influenced by the people surrounding the child. This matter was addressed in the case of *B Ravandran s/o Balan v Maliga d/o Mani Pillai* [1996] 2 MLJ 150, where the court did not follow the views of the child as the court commented that in all probability the child was influenced by material gains promised to be given or already given by the father.

[40] The question now is at which age can a child be considered as being capable enough to express an independent opinion? The Federal Court in the case of *Manickam v Intherahnee* [1985] 1 MLJ 56 ruled that a child of eight years who was in the custody of the father and the father's family could not reasonably be expected to express any independent opinion on his preferences. However, in *Mahabir Prasad*, the court gave the opportunity to the children aged seven and half and eight and half years to express their opinion.

[41] Both cases mentioned above reflect the position that a determination as to whether a child is able to express an independent opinion depends greatly on the circumstances peculiar to the facts of the case and the assessment of the judge of those circumstances. From the cases that have been decided, it may be reasonable to suggest here that the children above the age of seven can be presumed, subject to being rebutted and other extrinsic factors closely related to the case, to be capable of giving independent opinion.

[42] Whilst s 88(2) of the LRA requires the court to have regard to the wishes of the parents of the child, the question arises as to how far the wishes of the parents should be followed by the court. The Federal Court in the case of *Teh Eng Kim v Yew Peng Siong* observed as follows:

> as the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim ... Parental rights are overridden if they are in conflict with the welfare of the child.

[43] It can be said that the wishes of the parents will not be of much significance unless it can be shown that those wishes are in line with the welfare

of the child. Nonetheless, if the welfare of the child is equally balanced with either the wishes of the parents, the wishes of the relevant parents might tip the scale.

[44] Taking all the above into consideration, the question is whether the custody order of the High Court as affirmed by the Court of Appeal should be preserved. As stated earlier, the High Court judge had granted custody, care and control of the children to the ex-wife, with access given to the ex-husband every week on Sundays from 9am until 6pm under the supervision of the ex-wife at the ex-wife's house. According to the High Court judge, such orders were given after taking due consideration to, inter alia, the fact that the ex-wife had taken care of the children ever since birth; the ex-husband could not provide a conducive environment for the children; that the ex-husband was involved in criminal activities; that the status quo of the children should be maintained and that the children had clearly expressed their desire to be with their mother.

[45] It is a settled law that a custody order is never final or irreversible. The Federal Court in *Mahabir Prasad v Mahabir Prasad* had explained:

> Changes of circumstances, in our view may be brought into the picture to reverse a previous decision of the same court ... In such a case the matter is never res judicata. A custody order is not final and conclusive. If any change has taken place in the circumstances of the parties which warrants a reconsideration of the matter, the court is not bound by a former order, but will use its discretion with respect to the altered conditions, always bearing in mind the fact that the welfare of the infants are the paramount consideration.

[46] In the present case, a change in the circumstances had occurred. Two days after the custody order, Mithran was taken away from the ex-wife's house by the ex-husband. Since then Mithran has been with the ex-husband while Shamila remained with the ex-wife. Bearing in mind that the welfare of the children is the paramount consideration, we have, taken the liberty to see both the children in our chambers in order to determine whether their wishes to be with their mother remained the same.

[47] Mithran is now eight years old. He introduced himself as Nabil bin Abdullah. We found him capable enough to express his independent opinion and to decide his preference whether to live with his father or mother. He told us in clear terms that he is very happy to live with his father. He also told us that he does not wish to live with his mother.

[48] Shamila is now eleven years old. We found her to be matured enough to express her independent opinion and to decide her preference whether to live with his father or mother. She told us without hesitation that she prefers to live

with her mother rather than her father. She also informed us that she is now residing with her mother in Johor Bahru, and is a student at an international school there. She said she is very happy to be with her mother and does not wish to live with her father.

[49] Thus, we found that both children are certain of their choices. We also found both children have settled down and are well cared for respectively. We are of the view that taking into consideration the welfare of the children as of paramount importance, it is undesirable to disturb the present arrangement. In the circumstances, we have to vary the custody order granted by the High Court by making an order that the custody of Shamila remain with the ex-wife while custody of Mithran to be with the ex-husband.

[50] With regard to right of access to both children, it is commendable that the parties have managed to work out the terms and accordingly we have recorded a consent order on the terms as agreed by the parties. Similarly, the parties have agreed that the monthly maintenance order of RM500 to be paid by the ex-husband to the ex-wife be varied to RM250, as Mithran is now with the father since the order was made.

QUESTION 2

Whether on the interpretation of ss 52 and 53 of the Child Act 2001, a recovery order can be made when there exists a custody order given by the Syariah Court which is enforceable at the same time

[51] As stated earlier, the High Court had allowed the ex-wife's application for the recovery of the child Mithran from the ex-husband's custody. In allowing the ex-wife's application for the recovery order, against the IGP and/or his offices the High Court ordered the following:

(a) to enter the ex-husband's residence or Taska ABIM Nur Ehsan or any premises in order to recover the child, Mithran;

(b) to take custody of Mithran and to return the child to the custody and control of the ex-wife immediately;

(c) to remove Mithran from the custody of the ex-husband or from anyone having custody or control of Mithran; and

(d) to execute the High Court judgment irrespective of the Syariah Court order which had granted custody to the ex-husband.

[52] The application for the recovery order was made pursuant to ss 52 and 53 of the Child Act which read:

52(1) Any parent or guardian who —

A (a) does not have the lawful custody of a child; and

(b) takes or sends out a child, whether within or outside Malaysia,

without the consent of the person who has the lawful custody of the child commits an offence and shall on conviction be liable to a fine not exceeding ten thousand B ringgit or to imprisonment for a term not exceeding five years or to both.

(2) A person has lawful custody of a child under this section if he has been conferred custody of the child by virtue of any written law or by an order of a Court, including a Syariah Court.

C (3) ...

53(1) If it appears to the Court that there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child as described in section 52 the Court may make a recovery order.

D (2) A recovery order may be made by the Court onapplication being made by or on behalf of any person who has the lawful custody of the child.

(3) For the purposes of this section, a 'recovery order' may —

(a) direct any person who is in a position to do so to produce the child on request to any authorized person; E

(b) authorize the removal of the child by any authorized person;

(c) require any person who has information as to the child's whereabout to disclose that information to the authorized person;

F (d) authorized any police officer to enter into any premises specified in the order and search for the child, using reasonable force if necessary.

(4) ...

G **[53]** It is clear from the above that a recovery order is only applicable in circumstances provided for in s 52 and can only be obtained if the elements in s 53 are fulfilled. From the reading of s 53(1) and (2), it is clear that the requirements to be fulfilled to obtain a recovery order are:

(a) the court has reason to believe that a child has been taken or sent away; H and

(b) the act is done without the consent of the person who has lawful custody of the child.

I **[54]** Section 52(2) of the Child Act explains the meaning of the phrase 'lawful custody of a child'. A person is said to have lawful custody of a child if he has been conferred custody of the child by virtue of any written law or by an order of a court including a Syariah Court. It is clear from s 52(2) that a custody order by the Syariah Court is a lawful custody order.

[55] In the present appeal, there are two custodial orders. One was the Syariah High Court's order dated 19 September 2013, which granted custody of the children to the ex-husband. The other was the Civil High Court's order dated 7 April 2014, which gave custody of the children to the ex-wife. We are of the view that in light of the existence of the two conflicting custodial orders, the High Court judge should not have entertained the application of the ex-wife for the recovery of Mithran from the ex-husband. We acknowledge that by our decision in relation to Question 1 above, the Syariah Courts have no jurisdiction in this case to make the custody order. However, Syariah Court order remained a valid order until it is set aside. Thus, with respect, the High Court judge, cannot direct the IGP or his officers to execute the High Court judgment, irrespective of the Syariah High Court order.

[56] Thus, on the facts of this case, both the Syariah High Court order and Civil High Court order bind the IGP and his officers either way. Clearly, the execution and performance of one order is impossible without being in contempt of the other.

[57] In conclusion, we are of the view that on the facts and circumstances of this case, the recovery order should not have been given because the pertinent element under s 52 of the Child Act had not been fulfilled. Accordingly we would answer Question 2 in the negative.

[58] We, therefore allow the appeal on the recovery order. The orders of the courts below are set aside.

[59] In the circumstances of this case, we make no order as to costs. Deposits of these appeals to be refunded to the ex-husband.

Appeal on custody order dismissed and appeal on recovery order allowed with no order as to costs.

Reported by Kohila Nesan